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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1986

KURT VREEKEN and FRED VREEKEN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT 1

WHETHER THE TRIAL COURT'S VIOLATION OF APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS THROUGH THE CONSISTENT EXCLUSION OF EVIDENCE PROPER TO ESTABLISH LACK OF INTENT CONSTITUTED HARMLESS ERROR.

POINT 2

WHETHER PETITIONERS' CONVICTION FOR INCOME TAX VIOLATIONS WHICH WERE NOT PREVIOUSLY CRIMINAL CONSTITUTED A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS.

POINT 3

WHETHER THE RULE OF SPECIALTY INVOKED BY PETITIONER KURT VREEKEN TO PROTECT HIM FROM PROSECUTION ON TAX ISSUES IN THE UNITED STATES AFTER THE INITIATION OF THE EXTRADITION PROCESS CAUSED HIS RELEASE FROM CANADA CONSTITUTES A PRINCIPLE OF INTERNATIONAL LAW WHICH WAS NOT EFFECTIVELY WAIVED.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

UNITED STATES OF AMERICA, Respondent, vs. KURT VREEKEN and FRED VREEKEN, Petitioners	PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Fred Vreeken and Kurt Vreeken, father and son, and Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on October 21, 1986.

STATEMENT OF GROUNDS

A. OPINIONS BELOW

The October 21, 1986, opinion of the Court of Appeals to the Tenth Circuit, whose judgment is herein sought to be reviewed, is reprinted in the appendix pp A2-A29. An opinion by the trial court on the Rule of Speciality was published in United States vs. Vreeken, 603 F. Supp. 715 (D. Utah 1984).

B. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). This joint Petition is filed pursuant to Rule 19.4, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States as well as the provisions of the United States Tax Code, 26 U.S.C. Section 7203, Section 7206(1), and Section 7206(2) which are set out verbatim in the Appendix.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioners, Fred and Kurt Vreeken, were indicted on the 11th day of April, 1984, in the District of Utah. Both were charged with 36 counts of aiding and assisting in the preparation of false tax returns by devising a tax shelter plan which allegedly defrauded the U.S. government out of tax revenues in violation of 26 U.S.C. Section 7602(2).

Petitioner Fred Vreeken was also charged with two counts of intentionally misrepresenting his gross income on his 1979 and his 1980 tax returns in violation of 26 U.S.C. Section 7206(1). Petitioner Kurt Vreeken was also charged with three counts of failure to file income tax returns in violation of 26 U.S.C. Section 7203.

Both Petitioners were arraigned and pleaded not guilty. Prior to trial, Petitioner Kurt Vreeken made a formal Motion for dismissal before the trial judge based upon

application of the "Rule of Specialty". The trial court denied Petitioner Kurt Vreeken's Motion, the matter was set for trial and a jury trial commenced before the Honorable Bruce S. Jenkins in the United States District Court in and for the District of Utah, Central Division, on October 16, 1984. Verdicts of guilty as charged were reached against both Petitioners on November 13, 1984. On December 14, 1984, both Fred and Kurt Vreeken were sentenced to a three-year jail term.

Both Petitioners filed a Notice of Appeal on December 14, 1984. Petitioners' appeal focused on six points, three of which are the concern of this Petition. First, that errors by the trial court, violated Petitioners' Constitutional rights in connection with the systematic exclusion of evidence proper to demonstrate lack of intent. Second, that Petitioners convictions were based upon conduct not previously

criminal. Third, Petitioner Kurt Vreeken asserts that a principle of international law recognized by the United States and denominated the "Rule of Specialty" protects him from prosecution on the very tax charges upon which he was found guilty. Petitioners' appeal was denied by the Tenth Circuit on October 21, 1986 (see Appendix).

B. STATEMENT OF FACTS.

1. Aiding and Assisting in the Preparation of False Income Tax Returns.

Petitioner Kurt Vreeken became interested in numerous aspects of international taxation and banking in connection with his undergraduate studies as early as 1972. After he graduated with a B.S. in business management in marketing, Petitioner Kurt Vreeken continued to research the tax aspect of tax shelters at McGeorge School of Law in Sacramento, California. Without completing his legal studies at McGeorge, Petitioner Kurt Vreeken joined his father in

a tax shelter business in Salt Lake City, Utah.

The first tax shelter was marketed in 1977, the second from late 1978 through 1982. Substantially similar in most respects, the 1977 plan depended upon a slightly different mechanism to leverage the tax payer's investments. Fred Vreeken's primary responsibility was to market the tax shelter program set up and devised by his son, Petitioner Kurt Vreeken, as follows:

a. An investor would place 1X dollar in one of the Vreeken tax shelter programs.

b. Petitioners represented that a separate entity would contribute an additional 3X dollar (a gift) to the investor.

c. Petitioners represented that the 4X (1X + 3X) amount would be used for research and development pursuant to Internal Revenue Code Section

174 thereby allowing the taxpayer to claim the entire 4X amount as a deduction for federal income tax purposes.

The 1978 tax shelter program was represented to investors in similar terms except that Petitioners represented that an option company would contribute the additional 3X dollars. In return for the additional 3X contribution the option company purchased any and all rights the investor had in the outcome of the research and development the investor originally paid for.

To accomplish the foregoing, Petitioner Kurt Vreeken set up various entities sometimes called "doing business as" or "d/b/a"s. Petitioner Kurt Vreeken controlled the affairs of each of these entities except for the persons, entities or companies doing the actual research.

Had the tax shelter operated as represented, the government conceded that criminal

charges would not have been instigated. The government claimed, among other things, that Petitioner Kurt Vreeken misrepresented the tax shelter program thereby assisting taxpayers in the preparation of a false tax return.

The primary misrepresentations claimed by the government were as follows:

a. That the 3X dollars contribution to the investor for research and development was a fiction;

b. That the various entities and d/b/a's Defendant Kurt Vreeken set up to accomplish the tax shelter were a sham, put in place merely to deceive; and

c. That the representation that 4X dollars went to research was false.

Petitioners' defense consisted of the following rebuttal evidence:

a. That the 3X dollars in fact had value;

b. That the entities and d/b/a's were established in an effort to conform to the law as Petitioner Kurt Vreeken understood it and therefore Petitioners did not show a "high disregard" for the law. Consequently, Petitioners did not possess the specific criminal intent to break the law and should have been acquitted; and

c. That I.R.C. Section 174 permitted only a portion of the funds to be used for research and development while at the same time permitting the entire amount to be expensed.

In support of Petitioners' contentions, Petitioner Kurt Vreeken attempted to introduce evidence explaining that the 3X dollars had value. The source of the 3X dollars was a loan from a bank set up, owned and operated by the Petitioner. The entity had no officers and used other banks in which actual

monies were deposited. Petitioners' bank maintained records which consisted of various accounts (investor accounts, entity accounts). Petitioners' bank loaned 3X dollars to the grantor of the gift (1977 program) or to the option company (1978 and beyond).

The 3X dollars were given to the investor by the grantor of the gift or by the option company. The investor in a paper transaction would give the 3X dollars back to an entity of Petitioner Kurt Vreeken and his entity would pay off the Kurt Vreeken bank from which the funds were originally borrowed with interest.

The government summarily dismissed these transactions as circular financing. Petitioner Kurt Vreeken claimed that this method of financing was based on current commercial banking principles as he understood them. As considered below, expert testimony on these topics was excluded.

To rebut the government's second claim,

that the entities were a sham and established to deceive, Kurt Vreeken testified that he believed at the time that he had set up bona fide trust organizations and did so in order to conform with Treasury Regulation 301.7701-2.

The third allegation of the government, that Petitioner Kurt Vreeken misrepresented the amount of money used in actual research and development, was rebutted by Petitioner's testimony that he relied on Treasury Regulation 1.174-2(a)(2). Petitioner Kurt Vreeken took the position that the Internal Revenue Code specifically provided that monies used for administrative and business expenses, salaries and general research and development costs could be expensed as research and development.

2. Failure to File

Kurt Vreeken was also convicted of three counts of willfully failing to file a federal income tax return for the years 1979 through

1981, in violation of 26 U.S.C. Section 7203. Kurt Vreeken asserted that he did receive money for the two years in question, but that the funds received were for the payment of an option to purchase computer software and therefore said monies were not taxable pursuant to IRC 451 until such time as the option was exercised or lapsed.

Petitioner Kurt Vreeken asserted that the option lapsed and became taxable in 1982. Consequently, Petitioner Kurt Vreeken attempted to introduce his 1982 tax return as evidence of the fact that he had acted consistently with his claim that the monies were not taxable as monies in payment of an option in 1979, 1980 and 1981 and that based upon this characterization of the funds Petitioner paid the tax on said funds in 1982. Petitioner Kurt Vreeken also attempted to introduce testimony that he had relied on legal counsel for his tax treatment of these funds. The judge ruled that such evidence --

1982 tax returns and legal counsel's testimony -- was irrelevant.

3. Rule of Speciality

In the Fall of 1983, Petitioner Kurt Vreeken moved to Canada. On the 27th day of October, 1983, he was arrested by the Canadian police on an extradition warrant and immediately incarcerated in a Toronto prison. The extradition warrant was based on an indictment filed on the 25th day of October, 1983, in the Eastern District of Pennsylvania alleging nine counts of wire fraud in violation of 18 U.S.C. Section 1343 and two counts of interstate transportation of falsely made securities in violation of 18 U.S.C. Section 2314.

On the 31st day of October, 1983, Petitioner Kurt Vreeken was brought before the Honorable Judge Holiett, a Judge of the County Court of the Judicial District of York, to determine whether or not bail would be granted pursuant to the Canadian Extradi

tion Act. Bail was denied.

After bail was denied, Petitioner Kurt Vreeken was informed by Canadian counsel that to complete the extradition process could very well take in excess of six months to a year, during which time Petitioner Kurt Vreeken would remain incarcerated. Consequently, Petitioner Kurt Vreeken waived any of his rights under the Canadian Extradition Act and consented to be returned to the United States to be dealt with "according to law." The hearing lasted approximately ten minutes and Petitioner Kurt Vreeken was not made aware or advised of any rights he might have under the "Rule of Speciality." Thereafter Judge Whealey signed an Order which directed that Petitioner Kurt Vreeken be placed in the custody of U.S. Marshalls. Based upon the Order, Petitioner Kurt Vreeken was incarcerated in the Eastern District of Pennsylvania and later released on bail.

Only after Petitioner Kurt Vreeken

returned to the United States from Canada, pursuant to the extradition request, did the United States file a second indictment in the District of Utah, the subject matter of the Petition. A Motion to Quash the second indictment was filed and argued before the Court on the 9th day of October, 1984, and again during the pendency of the trial on the 25th day of October, 1984.

In both instances the Petitioner's argument that the indictment should be dismissed was denied by the trial judge. Petitioner submits that the trial court's failure to recognize Petitioner's rights under the "Rule of Speciality" constitutes both a violation of international law, compromising the integrity of the United States, as well as violating the Petitioner's personal rights under the Treaty of Extradition with Canada.

REASONS FOR GRANTING THE WRIT

1

THE TRIAL COURT'S VIOLATION OF APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS, THROUGH THE CONSISTENT EXCLUSION OF EVIDENCE PROPER TO ESTABLISH LACK OF INTENT, DID NOT CONSTITUTE HARMLESS ERROR.

The Petitioners in good faith believe that this case involves "special and important reasons" which compel a review on Writ of Certiorari in the Supreme Court. In particular, the Petition involves clear conflicts of principle between the decision of the 10th Circuit in question and the decisions of this Court, and other courts, on the rights of criminal defendants.

Personally convinced of the Petitioners' guilt, the trial judge consistently and systematically restrained Petitioners' efforts to defend themselves from the charges brought against them. The errors of which Petitioners' complain are serious and numerous ranging from the improper exclusion

of defense testimony to judicial characterizations as to Petitioners' defenses.

The mistakes made by the trial court were repeated on the Appellate level. An examination of the 10th Circuit opinion (Appendix pp A2-A29) reveals that no reasonable consideration was given to the effect of the errors complained of upon the true trier of fact -- the jury. As Justices Brennan and Blackmun recognized in their separate opinion in U.S. vs. Lane, 54 U.S.L.W. 4123, 4131 (U.S. Jan. 27, 1986).

> Harmless error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make and the reviewing court is concerned solely with whether the error may have had a 'substantial effect' upon that body.

A. ALL CHARGES BROUGHT AGAINST THE PETITIONERS REQUIRED WILLFUL VIOLATIONS OF THE LAW.

Title 26 U.S.C. Section 7203, 7206(1) and 7206(2) all require willful or intentional violations of known duties. See, e.g.,

U.S. vs. Brooksby, 668 F.2d 1102, 1104 (9th Cir. 1982). The due process clauses of the Fifth and Fourteenth Amendments require that those accused of a crime be proven guilty of every fact necessary to constitute said crime beyond a reasonable doubt. In Re: Winship 397 U.S. 358 (1970). Upon a grant of certiorari, Petitioners will seek to establish before this Court the violation of their Constitutional rights in connection with a wide range of errors by the trial judge.

B. PETITIONERS' RIGHTS WERE VIOLATED WHEN THE DISTRICT COURT REFUSED TO ALLOW RELEVANT EXPERT TESTIMONY BEFORE THE JURY ON THE ISSUE OF INTENT.

One key aspect of the Petitioners' defense involved expert testimony as to tax laws and banking procedures. Inasmuch as all of the criminal charges brought against the petitioners required willful violation of the law, the testimony proffered by the defense upon this subject was both relevant and admissible. The trial judge refused to allow Scott Blaser, J.D. L.L.M., an expert in tax

law, and David Sandberg, an expert in banking and Professor of Economics, to testify before the jury.

The testimony of Scott Blaser, Esq., was taken outside of the presence of the jury. He would have testified before the jury as follows:

1. That the Internal Revenue Code is beyond the scope of untrained persons. As part of a defense where a layman, Petitioner Kurt Vreeken, is relying on the fact that he made a "good faith" effort to follow the law and misunderstood, such testimony is relevant.

2. That Treasury Regulations 1.174-2(a)(2) and (a)(3) provide that not only research and development costs can be deducted by the taxpayer as research and development but that administrative, overhead, and fees incurred may be passed along to the original investor and deducted as if it were research and development. Such an

opinion is highly relevant and helpful to a jury in a case where Petitioner Kurt Vreeken is rebutting the allegation that his plan was deceptive and not allowable pursuant to the Internal Revenue Code. The court would not allow this testimony to go before the jury.

The exclusion of David Sandberg's testimony was also extremely debilitating to the defense. His testimony was taken outside the presence of the jury as follows:

1. That Petitioner Kurt Vreeken did try and copy what a regular bank would do in reference to issuing checking accounts or loans against the assets of his private bank. This is relevant in a case where Petitioner Kurt Vreeken claimed as part of his defense that he made a good-faith effort to follow banking practices when he loaned money from one of his entities to another of his entities.

2. That banks lend out more than they have in assets on hand. This is highly

relevant in a situation where Petitioner borrowed more money from one of his entities than he had assets in his private bank. The amounts borrowed comprised the additional 3X dollars transferred through a Vreeken entity back to the original investor to be invested in research and development.

3. That the 3X dollars borrowed had value. This information is critical to the defense in a situation where the government claims the 3X dollar has no value and was merely a paper transaction. The trial judge excluded this testimony.

Expert testimony was crucial to the defense since admission of that testimony could have precluded the finding of the requisite intent to violate the law.

Expert testimony has been approved not only as to factual questions, but also, under appropriate circumstances, on matters of law. In United States vs. Garber, 598 F.2d 843 (5th Cir. 1979), reh. 607 F.2d 92 (1979),

the broad scope of admissibility of expert testimony, where willfulness is at issue, is clearly acknowledged. The Garber court found that a criminal defendant is "entitled to wide latitude in the introduction of evidence." Id. at 99. In recognizing a defendant's entitlement to this protection, the 5th Circuit held that expert witnesses can testify on disputed points of law.

Not only did the trial court exclude expert testimony on the tax law aspects of the instant case, but also denied Petitioners' request for expert testimony explaining to a lay jury the banking practices which Petitioner Kurt Vreeken relied upon to fund his tax shelter. Petitioners were denied the opportunity to present critical evidence on the issue of their intent.

The complexity and obscurity of legal tax questions have increased dramatically in recent years, further justifying the use of expert legal testimony. The tax laws have

undergone such exponential growth that interpretation of the Internal Revenue Code is now beyond the comprehension of most, save tax specialists. The assistance of legal experts would aid in fairness and efficiency, especially in a criminal setting, in order to both explain the tax laws themselves, and consider a criminal defendant's intent to violate the same.

Expert testimony on the relative uncertainty of a law may also be useful to a jury. Where the willfulness of a party's conduct is at issue, and the party allegedly relied on the law, logic suggests that the more uncertain the law, the more likely it will be that the party acted in "good faith". The testimony should focus on whether the law contains ambiguities or uncertainties that would support the defendant's petition.

Federal Rule of Evidence 702 states, in pertinent part, that a witness may testify as

an expert "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...". This provision does not set boundaries on the content of the testimony. Instead it focuses on the utility of the testimony.

In this case, the expert testimony proffered by the Petitioners would have greatly assisted the trier of fact. The usefulness of experts in this particular case provided a basis for use of expert testimony therein. Based on the erroneous ruling of the trial judge, the Petitioners were denied the opportunity to question relevant and necessary experts on the uncertainty of the law at the time of the alleged violations or their opinion as to the reasonableness of the Petitioners' interpretations of the law.

C. THE SYSTEMATIC EXCLUSION OF EVIDENCE PROFFERED TO DEMONSTRATE LACK OF INTENT PREVENTED THE PETITIONERS FROM PRESENTING A FULL AND COMPLETE DEFENSE.

Petitioners' defense was severely and

prejudicially limited by the trial judge inasmuch as Petitioner Kurt Vreeken was repeatedly denied the opportunity to fully explain his alleged criminal acts, critical evidence was excluded, and the direct examination of witnesses against the Petitioners was limited.

In an effort to clearly and persuasively disprove Petitioners' asserted willful intent to violate the law, Petitioner Kurt Vreeken, for both himself and his father, repeatedly attempted to explain the reasoning and mental processes he went through, and the specific Internal Revenue Code sections and other materials he relied upon, and why he relied upon those materials.

At every turn, Petitioner Kurt Vreeken was prevented from fully explaining these relevant issues to his defense, and was constantly limited by the trial judge to a mere chronicling of unexplained events. In almost ever instance where Petitioner tried

to explain his interpretation of Internal Revenue Code language or the reasons why he engaged in a particular act he was cut off, many times on the Judge's own volition and without objection of opposing counsel. The issue was discussed directly with the judge on numerous occasions.

A typical exchange was as follows:

THE COURT: Well, are you through with the legal history at this point?

MR. McCONKIE: Well, I would like to ask one other question on that.

THE COURT: We're interested in what he did.

MR. McCONKIE: Your Honor, may I ask my client based upon that (the law) why he did this?

THE COURT: I don't know what you mean by why he did this.

MR. McCONKIE: What I'd like to do is ask, based upon his research at school, why, in your own words, as simply as you can, why did you set it (tax shelter) up this way?

MRS. CAMPBELL: Your Honor, as I recall the proffer there was nothing about the bank in that proffer.

THE COURT: He's changed the question. You go ahead.

MR. McCONKIE: Now, you just mentioned the research. Why then did you set your tax shelter up this way with the foreign limited partnership here --

THE COURT: Why don't you just let him tell his own story. Gosh we've gone through this so many times. Put your question and let him respond. Don't you testify.

MR. McCONKIE: Why did you set it up this way, in your own words, and take it slowly.

PETITIONER KURT VREEKEN: I set it up that way because I understood it to be in accordance with law. And then the next thing that I did was --

MR. WALZ: You Honor, I think he answered that question. Could we now have another question?

THE COURT: Put your next question.

*****

MR. McCONKIE: Why did you believe that you could lend money on a promissory note --

MR. WALZ: Your Honor, I can't let him finish that question.

THE COURT: That's the very same defect we talked about before, Mr. McConkie. Ladies and gentlemen, I'm going to send you home. We're going to conduct school here for a few minutes ...

Petitioners contend that Kurt Vreeken

should have been given an opportunity to fully explain his understanding of the laws, rules and regulations he relied on and why he relied on them. This was not an attempt by Petitioners to state the law. The purpose of such lines of questioning was to give the jury an opportunity to determine whether or not Petitioners' interpretation, whether correct or not, was reasonable and hence evidence that Petitioners acted in "good faith."

In like fashion, the trial judge erred in excluding Petitioner Kurt Vreeken's proffered testimony concerning the charge that he had intentionally failed to file his income tax for the years 1979, 1980 and 1981.

Petitioner Kurt Vreeken admitted that he had received funds during those specified years but that he believed those funds were not taxable at the time he received them because the funds were for the purchase of an option agreement. Petitioner Kurt Vreeken

stated that he was of the opinion that when the option either lapsed or was exercised that the funds at that point in time became taxable.

In support of this contention Petitioner Kurt Vreeken attempted to testify that he paid taxes on those specified funds in 1982 when the option lapsed. The Judge would not let him so testify. Neither would the Judge allow Petitioner Kurt Vreeken's 1982 tax returns to be entered as evidence. And finally, the Judge would not allow Gary Joslin, Petitioner Kurt Vreeken's attorney, to testify that he advised Petitioner Kurt Vreeken that option money was not taxable.

In addition, the trial judge erred in limiting the cross-examination of prosecution witnesses. The trial judge did not allow questions regarding the investors' potential bias, the amount of the tax shelter which the Internal Revenue Service allowed, the income of the tax shelter investor, and why the

investor had participated in the tax shelter program. Petitioners submit that all of these issues were relevant to a complete understanding of the tax shelter program.

D. DEROGATORY COMMENTS AND BIAS DISPLAYED BY THE DISTRICT COURT JUDGE PREJUDICED THE PETITIONERS' RIGHT TO A FAIR AND IMPARTIAL TRIAL.

In a federal criminal jury trial the judge is more than a mere moderator. He assumes the role of governing the trial process in order to assure proper conduct and impartiality.

Chief Justice Hughes specified the limitations of a trial judge in Quercia vs. United States, 289 U.S. 466, 470 (1933):

> ...The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling'.

Most important, a judge must not trespass on the jury's functions and responsibilities, among the most important of which is the right to assess credibility in finding

the facts, U.S. vs. Williams, 447 F.2d 894 (5th Cir. 1971), U.S. vs. Strokle, 431 F.2d 1273 (6th Cir. 1970). In addition, a judge must not interfere for a merely partisan purpose. He must not permit even the appearance of such an interference, U.S. vs. Curcio, 279 F.2d 681 (2nd Cir. 1960).

When a judge interrupts the testimony of an important defense witness or interrogates him in a manner reflecting the judge's disbelief, he is departing from the standard laid down in Quercia for the conduct of criminal trials.

When the attitude as well as the type of participation of a judge reaches the point where it is clear to the jury that the court believes the accused is guilty, the defendant's due process rights have been violated.

The Judge's bias against Petitioner Kurt Vreeken became more apparent as the case progressed. This bias was, on occasion, directly communicated to the jury.

For example, when Petitioner Kurt Vreeken sought use of the blackboard the trial judge said before the jury:

> Before we get to the blackboard, why don't you take them one at a time as to time and place and the whole routine, Mr. McConkie, so we just don't play with the blackboard.

The Court went on to say:

> I think it's important that we don't deal in hypothecations. I think it is important that we deal with what occurred...

This comment left the clear impression that Defendant Kurt Vreeken was making up his testimony. The judge lectured Defendant Kurt Vreeken and said, "...I simply don't want to break in anymore, I've broken in probably too much..." However, a short time later the trial judge broke in and cross-examined Defendant Kurt Vreeken and suggested by way of cross-examination that Defendant Kurt Vreeken may have fabricated part of an exhibit. At times the judge even went so far as to contradict Defendant Kurt Vreeken, and

criticize him for "editorializing."

Outside the presence of the jury the trial judge's bias was unmasked. For example, the trial judge stated to counsel:

> Well you know, a lot of this is just plain nonsense, you know it and I know it...

A few moments later he suggested that an exhibit was misleading, and then went on to berate Defendant Kurt Vreeken's testimony.

The trial judge stated that some of the facts were "bizarre" and summed up his feelings by stating, "There is a great line out of Alice in Wonderland where they say, 'words mean anything you want them to mean.'"

E. THE ERRORS COMPLAINED OF VIOLATE THE HARMLESS ERROR STANDARD.

Where, as here, a United States Court of Appeals has acknowledged that error occurred at the trial level, the standard of "harmless error" to be applied is clear. As expressed by this court in the oft quoted statement from Kotteakos vs. United States, 328 U.S. 750, 765, (1946):

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Although the errors complained of in this Petition were brought to the attention of the 10th Circuit, the Appellate Court simply continued the same erroneous analysis conducted by the trial judge:

> The Vreekens, however, misconstrue the government's theory of the case. In its opening argument the government conceded that the legality of the tax shelter "if operated as advertised and as represented by the Vreekens" was not in question. R. IV, 10. Instead, the government argues that the Vreekens misrepresented to investors material elements of the tax shelter. The investors "were supplied false information, ... the money that was represented to exist did not exist, ...the banks that were represented to exist did not exist, and ... the money that was

> supposed to be spent on deductible items was not so spent." Brief of Plaintiff-Appellee at 16.
>
> The Vreekens' fraudulent misrepresentations constituted the illegality at issue in this case. The evidence of these misrepresentations was overwhelming, clearly sufficient to send the issue of intent to the jury. (Appendix pp. A19-A20)

The analysis begs the question. As seen from the preceding discussion, none of the representations made by the Petitioners concerning the tax shelters were willfully false. Petitioners had a reasonable and good faith basis to believe that their representations concerning expenditures on deductible items, the establishment of banks, and the lending of money were all legitimate and appropriate.

Denied the chance to explain themselves, denied the opportunity to use expert testimony, denied a fair and impartial trial by the District Court Judge, the government's allegations of mispresentation could not be rebutted in front of the jury. Deprived of

the right to defend themselves, the Petitioners' conviction was the result of multiple errors which denied the Petitioners' substantial rights. Viewing the record as a whole, it cannot accurately be said that the deficiencies complained of merely constituted "harmless error".

2

PETITIONERS' CONVICTION FOR INCOME TAX VIOLATIONS WHICH WERE NOT PREVIOUSLY CRIMINAL CONSTITUTED A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS.

A. AS RECOGNIZED IN THE CASE OF United States vs. Dahlstrom, THE CRIMINAL COURTS ARE NOT THE PROPER FORUM FOR INTERPRETING TAX LAW.

Section 7206 of the Internal Revenue Code makes it illegal to willfully aid or assist in a return, affidavit, claim or other document which is fraudulent or false as to any material matter, whether or not such falsity or fraud is within the knowledge or consent of the person required to present

such return, affidavit, claim or document (Internal Revenue Code, Section 7206).

Petitioner Kurt Vreeken in this case structured a tax shelter based upon Section 174 of the Internal Revenue Code allowing a current deduction for expenditures made in regards to research and development. The tax shelter, which used foreign trusts and corporations as a basis for implemention, involved areas of the tax law that were completely unsettled by any clearly relevant precedent on the date alleged in the indictment. U.S. vs. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983), Cert. den. 466 U.S. 980 (1983). In particular, the use of foreign trusts to save taxes was a highly debatable issue at the time the tax was devised, Id., at 1427.

The confusion in the foreign trust area prompted the deputy director of the Internal Revenue Service to issue a position paper regarding the use of foreign trusts. This

position paper was not issued until the latter part of 1979. The indictment in Dahlstrom was premised upon actions which occurred before the issuance of the IRS paper, Dahlstrom, supra, at 1427.

The Court in Dahlstrom reasoned that even if it were to assume that Appellants were negligent in continuing to promote a tax shelter based upon the use of foreign trusts, in light of the Internal Revenue Service's adverse position paper, the law was clear that degrees of negligence in the tax system only gave rise to civil penalties Id. at 1428.

Pertinent Treasury Regulation 1.174-2(2), as interpreted in the Code, provided that provisions of Section 174 applied not only to costs paid or incurred by the taxpayer for research or experimentation undertaken directly by him but applied also to expenditures paid or incurred for research or experimentation carried on in the taxpay-

er's behalf by another person or organization. There is little case law interpreting this language and therefore such case law as exists is subject to reasonable dispute as to what the actual meaning of expenditures incurred on behalf of another person would be for purposes of Section 174. Superimposing the structure of foreign entities, such as controlled foreign corporations and foreign trusts over the area of Section 174, left the Petitioners in an area of the tax law for which there were no clearly relevant precedents to determine the legality of the tax shelter on the dates alleged in the indictment.

B. A CRITICAL ELEMENT OF THE CRIME IS MISSING.

In order to convict Petitioners under Section 7206, the government, among other elements of the crime, must prove beyond a reasonable doubt that the act of the Petitioners was willful.

Courts have frequently defined the term

"willfully" under Section 7206 to be a "voluntary intentional violation of a known legal duty", Dahlstrom, supra, at 1427.

As the court in Dahlstrom noted, when the law is highly debatable, a defendant actually imputedly lacks the requisite intent to violate it, Id. at 1428. A criminal proceeding, pursuant to Section 7206, is an inappropriate vehicle for pioneering interpretations of tax laws.

Criminal law concerns itself with willful violations of tax law and its purpose is not to penalize frank differences of opinion. The court in Dahlstrom, cited U.S. vs. Brooksby, 668 F.2d 1102, 1104 (9th Cir. 1982), which stated that the term "willful" under the statute "requires proof of specific intent to do something that the law forbids; more than a showing of careless disregard for the truth is required."

The law is clear that the economic realities underlying a transaction rather

than the form of the transaction are controlling for tax purposes. When the government asserted in the case at bar that, because the tax shelters had no economic substance they were illegal per se, they did so in light of the fact that the law in this area was completely unsettled by any clear relevant precedent on the dates alleged in the indictment.

Had Petitioners been negligent by continuing to promote the tax shelters the consequence should have resulted in civil penalties rather than criminal charges.

C. PETITIONERS WERE NOT GIVEN ADEQUATE NOTICE OF POSSIBLE FUTURE CRIMINAL PROSECUTION AS REQUIRED BY TAX LAW.

Due process requires that a person be given fair notice as to what constitutes illegal conduct in order that a defendant may conform his conduct to the requirements of the law, U.S. vs. Batchelder, 442 U.S. 114 123 (1979). The court concluded in U.S. vs. Dahlstrom that when there is no statute,

regulation or court decision which gives fair warning that the creation of a foreign trust or corporation as utilized in a tax shelter would result in criminal prosecution, then the case cannot be heard in the criminal courts, for, as a matter of law, under such circumstances a defendant could not have had the requisite criminal intent to violate the law, Dahlstrom, supra, at 1428.

3

THE RULE OF SPECIALITY INVOKED BY PETITIONER KURT VREEKEN TO PROTECT HIM FROM PROSECUTION ON TAX ISSUES IN THE UNITED STATES, AFTER THE INITIATION OF THE EXTRADITION PROCESS CAUSED HIS RELEASE FROM CANADA, CONSTITUTED A PRINCIPLE OF INTERNATIONAL LAW WHICH WAS NOT EFFECTIVELY WAIVED

Once the United States commenced the extradition process, by issuance of a warrant to have Petitioner Kurt Vreeken forcibly

returned from Canada, he could only properly have been prosecuted for the crimes for which he was returned. His subsequent charge and prosecution for alleged additional criminal wrongdoing, after his return to the United States, was error. This result follows from application of the "Rule of Speciality", which involved both rights which accrued to Petitioner, based upon the Treaty of Extradition between the United States and Canada (27 U.S.T. 983; TIAS 8237), as well as principles of international law, based upon the Treaty, which applied to the United States.

A. A DEFENDANT'S RIGHTS UNDER THE TREATY ACCRUE ONCE EXTRADITION IS REQUESTED BY THE UNITED STATES.

One hundred years ago this court decided, in United States vs. Rauscher, 119 U.S. 407 (1886), that principles of international, and not domestic, law apply where extradition proceedings have been invoked. Subsequent decisions have further explained the principles of international law to be

applied. For example, in Fiocconi vs. Attorney General of the United States, 462 F.2d 475, 481 (2d Cir. 1972) it was held that a defendant's rights under the "Rule of Speciality", as enunciated by this court in Rauscher must apply even where the return of the defendant was obtained from a foreign country on the basis of comity, rather than strict adherence to extradition treaty procedures.

> [W]e cannot agree that the basic principle of Rauscher is inapplicable where extradition has been obtained as an exercise of comity by the surrendering government. [There was a question as to whether the treaty promulgated by France for her protectorate Lebanon was still extant at the time of the extradition request, thus surrender of the fugitive per the extradition request by the United States was made on the basis of comity]...[a] rule of international law required that the receiving country should not try an extradited person for an offense for which the surrendering country would not have granted extradition;...Rauscher's conviction of an offense for which he was not and could not have been extradited did not violate the treaty, which was silent as to the rights of a person extradited

> thereunder; it violated a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty. Cf. Banco Nacional de Cuba vs. Sabbatino, 376 U.S. 398, 421-422, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964), and cases there cited. We likewise can see no reason in principle why the judicial remedy fashioned in Rauscher should not also apply when extradition has been obtained as an act of comity by the surrendering nation; the need for preserving the United States from a breach of faith is equally strong.

The first significant impact of the "Rule of Speciality" in connection with the initiation of extradition proceedings, therefore, is the interest of the United States in avoiding a breach of faith.

However, additional rights accrue to a defendant against whom extradition is sought in a foreign country. On January 30, 1978, the United States Senate passed S.1437 revising and reforming the United States case law and practice in the field of extradition. As reported in U.S. Department of State, Vol. 6, Digest of U.S. Practice in

Int'l. Law 374 (1978), Section 3214, on "Waiver" provides:

> A person who is arrested for extradition to a foreign nation may waive the requirements of formal extradition proceedings, including the necessity of issuance of a warrant of surrender by the Secretary of State, if, orally and in writing, he so advises the court before which an extradition hearing would be held that he knows of and waives all rights guaranteed by the applicable treaty or other international agreement,...Except as otherwise provided by the applicable treaty or other international agreement, or by this subchapter, all rights available to a person extradited pursuant to such treaty or other international agreement are available to a person waiving extradition pursuant to this subsection.

B. ABSENT A VOLUNTARY AND KNOWING WAIVER, A DEFENDANT'S RULE OF SPECIALITY RIGHTS PERSIST.

Once the United States actually commences extradition proceedings pursuant to a treaty, such as that with Canada, (as by filing the extradition request and even making a provisional arrest request) treaty provisions must be complied with. A waiver of the extradition hearing will not waive

specific protections and rights provided by the treaty, unless the person does so knowingly; unless the person making the waiver does so after being advised to the satisfaction of the judge that the waiver includes waiver of all the elements of extradition, including knowledge that he is waiving all his rights and protection under the treaty, such as the Rule of Speciality.

This principle is acknowledged, for example, in the proposed Extradition Act of 1982, Section 3193(b)

> The court shall --
>
> (1) inform a person making a waiver under this section of such person's right to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel; and
>
> (2) inquire of such person and determine whether such waiver is --
>
> (A) voluntary and not the result of threat or other improper inducement; and
>
> (b) given with full knowledge of its legal consequences.

The requirement of knowing waiver of rights is inherent in all of our basic notions of justice and fairness, and the judge has to satisfy him - or herself - that the waiver was knowing in the broadest sense of that term. (See, e.g., Johnson vs. Zerbst, 304 U.S.458 (1938) and Faretta vs. California, 422, U.S. 806 (1975) concerning the requirement that waiver of right to counsel, for example, must be knowing and intelligent.)

Indeed, it has long been held, and is still the law that the "courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of [a] treaty..." Rauscher, supra, at 419. See also, Head Money Cases, 112 U.S. 580, 598 (1884); Covgrove vs. Winney, 174 U.S. 64 (1899); Johnson vs. Browne, 205 U.S. 309 (1907).

Thus, where the applicable treaty contains a provision that "the person whose

extradition is sought shall have the right to use all remedies and recourses provided by [the] law [of the requested state]" (Extradition Treaty between United States and Canada, Art. 8, #27 U.S.T. 983 (1974)), and contains a further provision that "a person extradited under this Treaty shall not be detained, tried or punished in that territory of the requesting state for an offense other than that for which extradition has been granted..." (Treaty of Extradition, U.S. - Canada, supra, Art. 11) the protection of the Rule of Speciality obtains.

There is no question but that Petitioner Kurt Vreeken was never advised of his Rule of Speciality rights and never presented a knowing or intelligent waiver of the same. In the transcript of the extradition hearing before the Canadian judge, presented to the trial court, it was evident that the Rule of Speciality was never mentioned at all during the hearing. In point of fact, the judge

seemed unsure as to whether Petitioner Kurt Vreeken could even waive any of his rights under the Extradition Act.

The opinion of the court below (Appendix A-10) considering Petitioner Kurt Vreeken's Rule of Speciality rights as personal rights which only limited personal jurisdiction, entirely ignored both the application and the rationale behind the Rule of Speciality. In the first place, the rights which accrued to Petitioner Kurt Vreeken were not properly waived. In the second place, the principle of international law embodied in the Rule of Speciality has been violated. Petitioner Kurt Vreeken's trial on charges unrelated to those for which he was sought in Canada constituted a breach of faith by the United States in violation of the Rule of Speciality.

C. APPLICATION OF THE DOCTRINE OF SPECIALTY

The virtually universal principle of speciality requires that the fugitive

returned after the commencement of extradition be tried only for the offense(s) for which his extradition was sought. Before the fugitive may be tried for additional offenses, committed prior to his extradition, the accused must be released from custody and allowed to leave the United States. He will not be subject to prosecution on these additional charges, unless he decides not to leave the country after having been given notice and adequate time to depart.

The doctrine is, thus, a concomitant of the principle of double criminality, which prevents extradition for offenses which are not crimes listed in the extradition treaty and made criminal in the requested county. Implicitly, it protects the accused from unexpected prosecution, although it has principally been seen as a mechanism to protect the requested state from the abuse of its processes.

The Doctrine of Speciality is the law of

the land in the Unites States, whether or not it is embodied in a treaty Rauscher, supra, at 407. Indeed, as noted in Shapiro vs. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973):

> [T]he courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty...[T]he principle has been extended to bar prosecution for crimes listed in the treaty or for which extradition, for whatever reason, was not granted.

Analysis of the Second Circuit decision in Fiocconi, supra, provides even more insight into the proper decision for the instant case. The differences in the extradition treaty applied in Fiocconi and that in the instant case are such that the Second Circuit decision would not allow prosecution upon the facts of the instant case. In determining that the Rule of Speciality was not violated by prosecution for the narcotics offenses, the Second Circuit in Fiocconi noted the Extradition

Treaty between the United States and Italy provided:

> "...the person ... delivered up for the crimes enumerated ... shall in no case be tried for any ... crime, committed previously to that [the crime] for which his ... surrender is asked." Id. at 481

The Second Circuit continued:

> "If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, they could have accomplished this by adopting one of the standard clauses to that end...[citing authority]...The special provision in this treaty could well be read as an acquiescence in trial for crimes before surrender, at least if of the same general nature, provided only that they were not antecedent to that for which the surrender was asked." (Id.)

The United States - Canadian Treaty of Extradition is clear in its prohibition of prosecution for offenses committed prior to surrender other than those for which extradition was granted and, indeed, prohibits even acquiescence by the requested State to prosecution for any offense other than those

listed in the Treaty. The Fiocconi decision is a clear statement that the Rule of Speciality obtains once a formal request for extradition or provisional arrest under the treaty is made, whether or not the fugitive is returned by way of comity. If this is true, all the more reason to require the rule to apply when a fugitive decides, as in the instant case, to waive a prolonged stay in jail and an extradition hearing and to return voluntarily.

The Rule of Speciality is a concomitant of the principle of double criminality, which prevents extradition for offenses which are not crimes listed in the extradition treaty and made criminal in the requested county. Implicitly, it protects the accused from unexpected prosecution, although it has also been seen as a mechanism to protect the requested state from the abuse of its processes. The proposed United States Criminal Code sections relating to extradi-

tion recognize the rights available via international law and an extradition to the person extradited.

The Doctrine of Speciality is the law of the land in the United States, whether or not it is embodied in a treaty Rauscher, supra, at 407. It is, however, usually embodied in extradition treaties. Different treaties provide different limitations on the doctrine. The U.S. - Canada Extradition Treaty provides specifically that the "person extradited shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted..." 27 U.S.T. 983 Art 11.

The United States - Canada Extradition Treaty also provides, however, that the requested country may consent "to the detention, trial and punishment for an offense other than that for which extradition was granted ... provided such other offense

is covered by article 2." Article 2 of the Treaty, of course, lists the offenses which are extraditable. If the additional charges are not among those listed in Article 2 and satisfy the doctrine of double criminality, Canada cannot waive the Rule of Speciality and consent to prosecution with regard to them. The crimes with which Petitioner was charged are not listed under Article 2. Moreover, if Petitioner waived his extradition hearing without specific knowledge that he was also waiving his rights under the Rule of Speciality, those rights were not waived.

The claim that the Doctrine of Speciality is nothing more than a right of the requested state is at variance with our basic notions of fairness and due process that recognize that the accused is a participant in the extradition process and has right to be protected by the doctrine, when the requesting state acts at variance with its obligations, regardless of whether or not the

surrendering state protests such actions. Bassiouni, International Extradition: United States Law and Practice, VII, Sections 6-7 (1983). The proposed revision of 18 U.S.C. relating to extradition, discussed above at p. 49, recognizes that the protections in an extradition treaty are rights of the accused to be enforced in our courts. Indeed, the legislative requirement that the United States grant extradition only by virtue of a treaty provides for a guarantee to the relater that the provisions of the treaty will be applied. this is the essence of the decision in United States v. Rauscher, which recognized the Rule of Speciality as part of international law as acknowledged and applied in the United States Rauscher, supra, at 417. See also, Restatement (Second) of the Foreign Relations Law of the United States, Section 3(h), (1968). The Doctrine of Speciality reflects a fundamental principle of fairness and justice that persons

surrendered via the extradition process should not be subjected to indiscriminate prosecution by the receiving government (See U.S. vs. Rossi, 545 F.2d 814 (2d Cir. 1976) and U.S. vs. Flores, 538 F.2d 939 (2d Cir. 1976).

In addition, waiver of an extradition hearing is not a waiver of the rights that apply pursuant to an extradition treaty, unless the accused was fully advised that his waiver would have that effect. The Doctrine of Speciality, under the provisions of the U.S. - Canada Extradition Treaty, requires that an accused be tried only for the offenses for which he was extradited. Although Canada might be able to consent to the United States prosecuting the defendant for other offenses -- and this is clearly debatable -- if the defendant was not advised of the possibility of such proceedings when he waived a hearing in Canada, Canada absolutely cannot consent to prosecution for

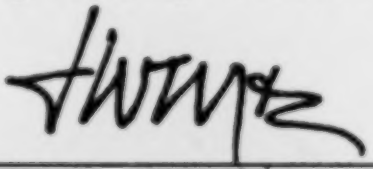
any offense that is not listed as extraditable in the treaty. Hence, the Petitioner Kurt Vreeken should have been released.

CONCLUSION

Therefore, Petitioners pray that a Writ of Certiorari be granted.

DATED this 19th day of December, 1986.

Respectfully submitted,



James W. McConkie,
Counsellor of Record for
Petitioners

10-21-86

84-2745
84-2750

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Slip Opinion

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	Nos. 84-2745 & 84-2750
vs.	)	
KURT VREEKEN and FRED R.VREEKEN,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the District of Utah
(D.C. No. Cr-84-00048J)

Kathleen M. Adams and James W. McConkie of Parker, McKeown & McConkie, Salt Lake City, Utah, for Defendant-Appellants.

Stewart C. Walz, Assistant United States Attorney (Brent D. Ward, United States Attorney, and Tena Campbell, Assistant United States Attorney, with him on the briefs), Salt Lake City, Utah, for Plaintiff-Appellee.

Before BARRETT and LOGAN, Circuit Judges, and THOMPSON, District Judge.*

LOGAN, Circuit Judge.

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*The Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, sitting by designation.

Defendants Fred R. Vreeken and Kurt Vreeken appeal their convictions for aiding in the preparation of false income tax returns in violation of 26 U.S.C. Section 7206(2), and willful failure to report income in violation of 26 U.S.C. Sections 7206(1) and 7203. Kurt Vreeken contends that the "rule of speciality" contained in the United States - Canada extradition treaty bars his prosecution on the tax offenses charged. Both Vreekens make the following arguments on appeal: (1) the trial court erred in excluding evidence of lack of intent; (2) the relevant tax law was so unsettled that intent, as a matter of law, could not be proven; (3) the court improperly excluded testimony of expert witnesses; (4) the court erred in instructing the jury on intent; and

(5) derogatory comments by the trial judge prejudiced their right to a fair trial. Fred Vreeken also challenges the court's allowing the prosecution to cross-examine him beyond the scope of his direct testimony.

From 1977 to 1980 Fred Vreeken and his son, Kurt Vreeken, designed, operated, and sold tax shelters. The shelters promised investors a four-to-one tax write-off. The Vreekens represented that investors would contribute a specified amount of money, 1X dollars, into the shelter and a foreign entity would contribute three times this amount, 3X dollars, as a gift to the investor (under the plan marketed in 1977), or as the purchase price of an option on the investor's rights (under the plans marketed in 1978-80). The 4X dollars (1X + 3X) would then be used for research and development pursuant to I.R.C. Section 174, for which the taxpayer/investor would be entitled to claim a deduction for federal income tax purposes

for the entire 4X amount.

On April 11, 1984, the Vreekens were indicted on thirty-six counts each of aiding and abetting in the preparation of false and fraudulent income tax returns in violation of 26 U.S.C. Section 7206(2). In addition, Fred Vreeken was indicted on two counts of willfully signing and subscribing false income tax returns in violation of 26 U.S.C. Section 7206(1), and Kurt Vreeken was indicted on three counts of willful failure to file income tax returns in violation of 26 U.S.C. Section 7203. After a three-week trial, the Vreekens were convicted on all counts.

I

Kurt Vreeken asserts that the "rule of speciality" contained in a Treaty on Extradition, Dec. 3, 1971, United States - Canada, 27 U.S.T. 983, T.I.A.S. No. 8237, protects him from this tax prosecution. Article 12(a) of the treaty states that rule as follows:

"A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted..."

On October 27, 1983, Kurt Vreeken was arrested in Toronto, Canada, pursuant to an extradition request by the United States government. The indictment on which the request was based charged Vreeken with several counts of wire fraud. On November 2, 1983, Vreeken signed a "Waiver and Consent," and was delivered on court order to a United States Marshal in Toronto. After his return to the United States and while released on bail for the wire fraud charges, Vreeken was indicted on the charges now before us.

Kurt Vreeken's rule of speciality claim raises several issues, including whether the treaty applies when formal extradition proceedings were never completed, whether he waived the rule's protection by signing the

"Waiver and Consent" and, if so, whether the waiver was "knowing." See United States v. Vreeken, 603 F. Supp. 715 (D. Utah 1984). We need not reach these issues, however, as we agree with the trial court that Kurt Vreeken failed to raise the objection in a timely manner. Id. at 723-24. The Federal Rules of Criminal Procedure require a defendant to make all "objections based on defects in the institution of the prosecution" by the deadline set by the court for making pretrial motions. Fed. R. Crim. P. 12(b)(1), (c), (f). Failure to make a timely objection constitutes waiver of the objection. Id. 12(f). Although, under Rule 12(b)(2), objections challenging the court's jurisdiction may be made at any time, the term "jurisdiction" as used there refers solely to subject matter jurisdiction, not to personal jurisdiction. Sewall vs. United States, 406 F.2d 1289, 1292 (8th Cir. 1969); Pon vs. United States, 168 F.2d 373, 374 (1st

Cir. 1948); see also 8 R. Cripes, Moore's Federal Practice paragraph 12.03[1] at 12-19 (1986).

The speciality rule may initially appear to limit the courts' subject matter jurisdiction, because it bars trial of an extradited defendant on some charges but not on others. But the extradition process is one whereby a court gains personal jurisdiction over a defendant, see 2 D. O'Connell, International Law 792-806 (1965) (Ch. 23, "Personal Jurisdiction: Extradition and Asylum"). Insofar as a defendant has a right to claim the rule's protection, it functions to limit the court's personal jurisdiction over the defendant.

This point is emphasized in the very case that gave extradited defendants a right to claim the rule's protection, United States v. Rauscher, 119 U.S. 407, 30 L. Ed. 425 (1886). There, in applying the rule of speciality, the Court concluded: "[W]hile

the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial." Id. at ____, 30 L.Ed. at 433-34 (emphasis added). Rauscher explicitly contemplated the possibility of gaining personal jurisdiction in the future: "[A]t some future time, when the defendant may have been properly brought within the jurisdiction of the court, or rightfully found within such jurisdiction, he may then be tried..." 119 U.S. at ___, 30 L.Ed. at 433. See also United States vs. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (analyzing rule's effect on personal jurisdiction).

The ability of a defendant to waive the rule of speciality's protection also supports treating it as a limit on personal jurisdiction. By declining an opportunity to leave the country, an extradited defendant effectively can consent to a court's juris-

diction to try him on charges other than those stated in the extradition request. Although parties can consent to personal jurisdiction, it is well settled that they cannot consent to subject matter jurisdiction. California vs. LaRue, 409 U.S. 109, 112 n.3 (1972); see also 1 J Moore, Moore's Federal Practice paragraph 0.60[4] at 624 (1986). Indeed, the courts must raise a lack of subject matter jurisdiction even if the parties have not. This does not appear to be the kind of issue we should hold cannot be waived. If a defendant could waive the issue knowingly he should be able to waive it by procedural default--in this case, failure to follow the rules of the local forum. See Smith vs. Murray, 54 U.S.L.W. 4833 (U.S. June 26, 1986); Murray vs. Carrier, 54 U.S.L.W. 4820 (U.S. June 26, 1986) . Thus, in the circumstances of this case, we hold that Kurt Vreeken had to timely raise an objection based on the rule of speciality in a pretrial

motion.[1]

The trial court here originally set May 25, 1984, as the deadline for submission of pretrial motions pursuant to Fed. R. Crim. P. 12(c), and later extended the deadline to August 15, 1984. Kurt Vreeken, however, did not allege the rule of speciality as a bar to his prosecution on the tax offenses until September 26, 1984, more than a month after the extended deadline. While "for cause shown" the trial court may grant relief for this error, Fed. R. Crim. P. 12(f), the court here denied further relief. 603 F.Supp at 724. Thus, by procedural default, Kurt

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[1]Although the rule of speciality is primarily designed to protect the "dignity and interests" of the asylum state, Shapiro vs. Ferrandina, 478 F.2d 894, 906 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973); see Rauscher, 119 U.S. at ___, 30 L. Ed. at 430, our holding today does not threaten these values. Canada's interests in United States citizen Kurt Vreeken's prosecution for tax crimes against the Unites States are not great in the first place, and are attenuated because Vreeken was returned before any evidentiary hearings or a finding of extraditability was made by a Canadian officer or court.

Vreeken waived his right to assert the rule's protection. Stevenson vs. United States, 381 F.2d 142, 144 (9th Cir. 1967) (motion on day of trial not timely); cf . United States vs. Cadena, 585 F.2d 1252, 1260 (5th Cir. 1978) (objection before pretrial motion cutoff was timely).

II

The Vreekens assert that the court excluded evidence proffered to demonstrate lack of intent. Specifically, the Vreekens claim that (1) Kurt Vreeken was denied an opportunity to explain why he structured the tax shelters as he did; (2) evidence regarding Kurt Vreeken's 1979-81 income was excluded; (3) investors in the tax shelter could not be adequately cross-examined; and (4) the Vreekens were denied the use of a blackboard.

A

The Vreekens assert that the court denied Kurt Vreeken the opportunity to show

the jury that he acted without criminal intent, by hindering his ability to explain his reasoning and mental processes in structuring the tax shelter.

This court has held that in the context of tax prosecutions that "the accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." United States vs. Brown, 411 F.2D 1134, 1137 (10th Cir. 1969). We agree that the trial court too strictly limited some of Kurt Vreeken's testimony. The court several times limited Kurt Vreeken's testimony to descriptions of physical acts: "I think we ought to have him simply tell us what he did... What did you do? What did you do?" R. VIII, 1382; "I think you're really interested in putting fact questions." R. IX, 1769; see also R. VIII, 1341, 1345. Moreover, the judge stated, "We're interested in what he did." R. IX, 1767; see also R. IX, 1571. The jury

might have construed these latter comments as instructions to disregard issues of intent. The Vreekens' attorney summed up his clients' frustration when he told the judge: "But [the jurors] never get to see what he's thinking. It's like A shoots B. He come over, he thinks the gun is unloaded, so in trial the judge says to him you can only tell what you did." R. IX, 1638-39.

Although the judge's comments were error, we find the error harmless. Under the Supreme Court's recent decision in United States vs. Lane, 54 U.S.L.W. 4123 (U.S. Jan. 27, 1986), we can reverse only upon a finding that the error "affects substantial rights" and "results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 4126 (quoting Kotteakos vs. United States, 328 U.S. 750, 776 (1946)). The harm attributable to the error in question is limited by several factors.

Kurt Vreeken was allowed to testify for three days on direct and had at least two lengthy opportunities to present testimony bearing on his thought processes. Moreover, the government introduced substantial evidence tending to show intent. The Vreekens' tax shelter was not only blatantly fraudulent, see R. X, 1852-59 (describing fictitious bank loans), but the Vreekens also took great pains to conceal their activities from the Internal Revenue Service. Given that Kurt Vreeken had substantial opportunity to testify with regard to his intent and that the evidence of guilty intent was overwhelming, we hold that the error was harmless.

B

Kurt Vreeken claims that the testimony of his tax attorney and the evidence of his 1982 tax return were relevant to his failure to file tax returns in 1979, 1980, and 1981. Kurt Vreeken admitted that he had received funds during these years, but asserted that

"he believed these funds were not taxable at the time he received them because the fund were for the purchase of an option agreement." Appellant's Brief at 35.

The tax attorney, Gary Joslin, was to testify that in 1982 or 1983 he had advised Kurt Vreeken that the option money was not taxable. Joslin's advice in 1982 or 1983, however, could in no way be relevant to establishing Kurt Vreeken's state of mind at the time he failed to file tax returns in 1979, 1980 and 1981. Thus, excluding the tax attorney's testimony was proper. Kurt Vreeken's decision to report these moneys in his 1982 tax return was relevant to his intent in failing to file tax returns in the three earlier years, because Vreeken asserted his belief that such funds were only taxable when the options lapsed in 1982. However, without more, we cannot find that the trial court's exclusion of the 1982 return was an abuse of discretion.

C

The Vreekens complain that the court improperly limited their cross-examination of investors. The court, however, properly excluded as irrelevant questions concerning the income of tax shelter investors and the reasons for their participation. The Vreekens never asserted a basis on which the other questions that were disallowed might have been relevant. Moreover, the Vreekens overstate the degree to which they were hampered in questioning the bias of witnesses. The court, for example, allowed questions whether IRS agents had coerced or influenced testimony.

D

Finally, the Vreekens complain that the court denied them the use of a blackboard. Because blackboards can be easily erased, their use limits the quality of a record for later jury inspection and appellate review. This denial was well within the discretion of

the court to control the trial process. See Geders vs. United States, 425 U.S. 80, 86-87 (1976).

III

The Vreekens claim that the reasoning in United States vs. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984), should immunize them from prosecution as a matter of law. In Dahlstrom, the Ninth Circuit reversed the convictions of defendants who had organized a foreign trust tax shelter scheme, because "when the law ... is highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it." Id. at 1428 (quoting United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974)).

The Vreekens, however, misconstrue the government's theory of the case. In its opening argument the government conceded that the legality of the tax shelter "if operated as advertised and as represented by the

Vreekens" was not in question. R. IV, 10. Instead, the government argues that the Vreekens misrepresented to investors material elements of the tax shelter. The investors "were supplied false information, ... the money that was represented to exist did not exist, ...the banks that were represented to exist did not exist, and ...the money that was supposed to be spent on deductible items was not so spent." Brief of Plaintiff-Appellee at 16.

The Vreekens' fraudulent misrepresentations constituted the illegality at issue in this case. The evidence of these misrepresentations was overwhelming, clearly sufficient to send the issue of intent to the jury.[2]

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[2]The Vreekens' contention that the uncertain legality of such tax shelters denied the Vreekens fair and adequate notice to support a criminal conviction, see United States vs. Batchelder, 442 U.S. 114, 123 (1979), is also without merit. The Vreekens had notice that the fraudulent misrepresentations at issue in this case were illegal.

IV

The Vreekens argue that exclusion of the testimony of tax and banking experts was improper. But the government's straightforward theory of the case, see III supra, also informs the trial court's decision to exclude expert testimony.

We note initially that "the admission of expert testimony is within the sound discretion of the trial court, and its rulings will not be disturbed absent a clear abuse of discretion." United States vs. Barton, 731 F.2d 669, 672 (10th Cir. 1984). As a general rule, questions of law are the subject of the court's instructions and not the subject of expert testimony. United States vs. Ingredient Technology Corp., 698 F.2d 88, 97 (2d Cir.), cert. denied, 462 U.S. 1131 (1983); see also United States vs. Jensen, 608 F.2d 1349, 1356 (10th Cir. 1979) ("an expert witness cannot state legal conclusions by applying law to the facts").

We agree with the Vreekens that when an area of law is uncertain or unresolved, the testimony of an expert may be relevant to show whether the defendant acted "willfully." See United States vs. Garber, 607 F.2d 92, 98-99 (5th Cir. 1979); United States vs. Clardy, 612 F.2d 1139, 1153 (9th Cir. 1980); but see Ingredient Technology Corp., 698 F.2d at 97 (criticizing Garber). But such is not the case at bar. The Vreekens were accused of not operating the tax shelter as advertised, of misrepresenting to investors material elements of the tax shelter. The law regarding this kind of fraud and misrepresentation is well settled, and therefore expert opinion regarding the complexity of the tax law could be properly excluded.

The government's straightforward legal theory similarly undermined the Vreekens' case for expert banking testimony. Moreover, the trial court could properly determine under Fed. R. Evid. 403 that the probity of

such testimony was substantially outweighed by the danger of confusion or undue delay. Cf. Hill vs. Bache Halsey Stuart Shields Inc., 790 F.2d 817, 826 (10th Cir. 1986).

V

The Vreekens also argue that a jury instruction unconstitutionally shifted the burden of proving intent from the prosecution to defendants. They rely on Sandstrom vs. Montana, 442 U.S. 510, 513 (1979) (invalidating the instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts"). Under Sandstrom the test for unconstitutionality is whether any "reasonable juror could have given the presumption conclusive or persuasion-shifting effect." Id. at 519. To carry out this test a court "cannot read the challenged instruction in isolation, but must consider the instruction as a whole in determining whether a reasonable juror would have understood the court to have shifted the

burden of persuasion." Wiley vs. Rayl, 767 F.2d 679, 681 (10th Cir. 1985).

The instruction at issue, as given in its entirety, was:

> "Intent ordinarily may not be proved directly because there's no way of fathoming or scrutinizing the operations of the human mind, but you may infer a defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence in the case."

R. X, 2213.

This instruction did not amount to error under Sandstrom. The court did not speak of presumptions, but instead repeatedly suggested that the jury "may infer" or "may consider" certain evidence and emphasized that it was "entirely up to [the jury] to decide." This difference is crucial. As this circuit

has held: "To allow the jury to pursue a deductive process on a permissive basis is far different from advising the jury that the law presumes that a person intends the ordinary consequences of his voluntary acts." United States vs. Ogle, 613 F.2d 233, 243 (10th Cir. 1979) (emphasis in original), cert. denied, 449 U.S. 825 (1980). The instruction given in this case conforms to our standard as enunciated in Ogle and does not offend the Constitution.

Additionally, the Supreme Court has recently announced that Sandstrom-type instructions will be subject to harmless error analysis. Rose vs. Clark, 54 U.S.L.W. 5023 (.U.S. July 2, 1986). Thus, even if we were to assume that the instruction violated the Sandstrom rule, we must examine it to determine whether the error could have made a difference in the outcome of the case. Based upon our examination of the record as a whole, we are confident the

giving of the instruction was "harmless beyond a reasonable doubt." 54 U.S.L.W. at 5025.

VI

The Vreekens also contend that derogatory comments by the district court judge prejudiced their right to a fair trial. The Vreekens claim that the judge's comments left a clear impression on the jury that Kurt Vreeken was making up his testimony. We disagree. The judge's admonitions were merely against using hypotheticals. As such, they were well within the reasonable bounds within which a trial judge may act. Cf. United States vs. Shelton, 736 F.2d 1397, 1404 (10th Cir.) (quoting Cooper vs. United States, 403 F.2d 71, 73 (10th Cir. 1968) (trial judge's comment to defense counsel that court did not intend to take time "to hold law school" not prejudicial), cert. denied, 105 S. Ct. 185 (1984). We need not consider remarks made outside the presence of

the jury, since these could not have prejudiced the jury. United States vs. Buchanan, 787 F.2d 477, 486 (10th Cir. 1986).

VII

Finally, Fred Vreeken claims that the court allowed prosecution cross-examination beyond the scope of his direct testimony in several instances, violating his Fifth Amendment privilege against self-incrimination. Examining each of these instances in turn, we find the trial court's ruling proper. The single question regarding a business associate, Eugene Esson, was appropriate because Fred Vreeken had himself volunteered their association. Cross-examination regarding the organization of a fictitious bank, Teschen, and payments that he received from Teschen, were relevant for purposes of impeachment, because Fred Vreeken admitted that he had testified at prior hearings that he did not know who had formed or controlled Teschen. Cross-examina-

tion regarding destruction of documents was also relevant to impeach defendants' prior testimony about newly discovered documents.

Fed. R. Evid. 611(b) permits the trial judge "in the exercise of discretion [to permit inquiry on cross-examination] into additional matters." The Supreme Court has held that "a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." McGautha vs. California, 402 U.S. 183, 215 (1971). The cross-examination at issue here was sufficiently related to Fred Vreeken's testimony on direct to avoid reversible error. See United States Vs. Varoz, 740 F.2d 772, 780 (10th Cir. 1984). Such rulings are "peculiarly susceptible to trial court decision." United States vs. Gant, 487 F.2d 30, 35 (10th Cir. 1973), cert. denied, 416 U.S. 941 (1974).

AFFIRMED.

TITLE 26 UNITED STATES CODE

SECTION 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax ot tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

TITLE 26 UNITED STATES CODE

SECTION 7206. Fraud and false statements

Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; ...shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than 3 years, or both, together with the costs of prosecution.

THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.